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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 189

SHAMROCK TOWING CO., INC.,

Petitioner,

v.

F. E. GRAUWILLER TRANSPORTATION CO., INC., GALLAGHER BROTHERS SAND & GRAVEL CORPORATION, THOMAS HENRY MATERIAL CO., and THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondents.

BRIEF FOR RESPONDENTS F. E. GRAUWILLER TRANSPORTATION CO., INC., AND GALLAGHER BROTHERS SAND & GRAVEL CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER E. HECKMAN,
Proctor for Respondents.

JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6 182

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POINT I

The Court of Appeals rightly imposed on petitioner the burden of proving that another's negligence intervened between the negligent mooring by petitioner's tug and the damage.

Petitioner overlooks the findings of its own negligence in mooring when it states that the Court of Appeals imposed on a tug the duty of explaining damage to its tow. The holding of the Court of Appeals was that petitioner

had failed to carry "the burden of proving that the Henry Company was guilty" of intervening fault (R. 305).*

Petitioner does not dispute that the scow *Sherlie* overturned and sank because she was holed by a spile (Finding No. 11, 268, Opinion, 263, C. A. Opinion, 304).

Nor does petitioner assert error in the holding that petitioner's tug *James J. McGuirl* was negligent in mooring the *Sherlie* so close to the spiles and in such manner that after the tide began to ebb she would drift over them (Findings Nos. 4, 5 and 6, 267-8; Conclusion 1, 269). Of the tug's actions the Court of Appeals said (304):

> "The negligence of the tug is beyond debate, and so the judge found. Indeed, it was most gross; for, since the *Sherlie* was 112 feet long, over nine-tenths of her length lay beyond the end of the pier and close alongside the broken spiles. The ebb tide had a leverage upon her outer end which made it most probable that the fasts by which she was moored to the pier and to the Port Jefferson, would either render or part. * * *"

The District Court had said (266):

> "Beyond doubt, *James J. McGuirl* was guilty of fault in leaving the *Sherlie* where she did. * * *"

In that situation the Court was clearly right in imposing on petitioner the burden of establishing intervening negligence by a fair preponderance of the evidence.

> "* * * To be relieved from the consequences of his own fault, a wrongdoer, must do more than merely suggest the possibility that the tort of another may have intervened. Cf. *Alexandre* v. *Machan*, 147 U. S. 72, 85, 13 S. Ct. 211, 37 L. Ed. 84, 85; *The C. E. Paul*, 175 F. 246 (D. C. N. J.); *The Newburgh*, 130 F. 321 (C. C. A. 2); *The Mexico*, 84 F. 504 (C. C. A. 2). The burden of proving that an intervening act

(References are to pages of the Record.)

of negligence caused the loss was on the appellant. *The Bartle Daly*, 45 F. (2d) 605 (C. C. A. 2); *The Gladiator*, 79 F. 445 (C. C. A. 1); *The Fensher, Swab*, 212."

The B. B. No. 21, 54 F. (2d) 532.

The District Court had concluded as a matter of law that petitioner had met its burden of proving intervening negligence (Conclusions 4 and 5, R. 269), but founded the conclusions on an inference based on another inference drawn from the testimony of a single witness that *after* the damage to the *Sherlie* he found some of the vessels in the slip in different positions (Conclusion 4, R. 269). There was no testimony that scows had been shifted *before* the damage or that the shifting caused the damage. There was ample denial that any shifting had been done. Nevertheless, the District Court drew an inference that scows had been shifted before the *Sherlie* was damaged, and from that inferred that the shifting caused the damage. The Court of Appeals referred to the testimony on which the District Court based its first inference as "well nigh incredible", stated it came from a witness whose memory was "obviously most unreliable" and reviewed the evidence which preponderated against it (Opinon, 304-5). The Court of Appeals made it plain that any finding based on such testimony was "clearly erroneous".

POINT II

The Court of Appeals rightly held that petitioner had not proven delivery of the *Sherlie* to the consignee Henry Company.

The Court of Appeals said (Opinion, p. 306):

> "Delivery is a mutual transaction which requires the consent of the person who is to take possession, as well as that of the one who gives it."
>
> * * * * * * *
>
> "This was not such a delivery; not only was it out of hours, but it was to the last decree perilous, as the event proved. If the tug would discharge itself of its duty, it was bound in such circumstances to secure an express acceptance, and there could be no acceptance except by an employee authorized by the Henry Company to accept. The maundering of the *Sherlie's* bargee was utterly inadequate for the purpose. If a tug master chooses to leave his charge wantonly exposed to destruction, he will not relieve his principal by sending an inarticulate bargee to announce what he has done to whomever he may find about the premises."

Petitioner has not cited any decision holding to the contrary in a case of this kind, where the asserted delivery was negligently made alongside a bed of spiles over which the changing tide would inevitably swing the scow.

POINT III

Neither respondent F. E. Grauwiller Transportation Co., Inc., nor respondent Gallagher Brothers Sand & Gravel Corporation was negligent. There could be no acceptance by the scowman of the improper mooring.

The *Sherlie* had no power of her own. It is conceded there was no way her keeper could arrange lines to avoid the consequence of the petitioner's negligent mooring (R. 111-2).

It is well settled that the lone man on a harbor craft of this kind does not have authority to vary contracts for safe delivery by failing to protest against the tug's improper mooring.

> "Having in mind the 'feckless folk' who frequently man barges, it would be out of reason to imply an authority in them to assume the risk of such damage on behalf of the owner of the boat."
>
> *The B. B. No. 21,* 54 F. (2d) 532 (*supra*).

See also *The P. Dougherty Co.* v. *G. M. McAllister,* 159 F. (2d) 486; Cert. denied 331 U. S. 848, 67 S. Ct. 1734.

CONCLUSION

No important questions are involved. Petitioner has not demonstrated conflict between this decision and those of this Court or of other Circuits. The decision of the Court of Appeals was correct and petitioner has failed to show any reason why this Court should grant a writ of certiorari.

Respectfully submitted,

CHRISTOPHER E. HECKMAN,
Proctor for Respondents.